NATIONAL UNION OF HOTEL, BAR & RESTAURANT WORKERS PENINSULAR MALAYSIA & ANOR v. MAHSYUR MUTIARA SDN BHD (SHERATON LANGKAWI BEACH RESORT)

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
ZAMANI A RAHIM JCA
ZALEHA YUSOF JCA
[CIVIL APPEAL NO: W-01(A)-272-07-2016]
30 AUGUST 2017

LABOUR LAW: *Employment – Retirement – Retirement benefits – Claim for service charges to be included in calculation of retirement benefits – Collective agreement silent on definition of 'wages' – Whether definition in Employment Act 1955 to be adopted – Whether service charge formed part of 'wages' for purpose of computing retirement benefits*

LABOUR LAW: *Trade union – Collective agreement – Retirement benefits – Claim for service charges to be included in calculation of retirement benefits – Collective agreement silent on definition of 'wages' – Whether definition in Employment Act 1955 to be adopted – Whether service charge formed part of 'wages' for purpose of computing retirement benefits*

Puan Zurriyani, an employee of the respondent, lodged a complaint with the first appellant that the respondent had failed to pay her retirement benefits and that the service charge, which was part of wages had not been included in the calculation of retirement benefits. Consequently, the first appellant lodged a complaint of non-compliance with art. 27 cl. (b)(iii) of the Fourth Collective Agreement ('the CA') to the Industrial Court. The Industrial Court handed an award ordering the respondent to comply with art. 27 of the CA and pay the sum of RM40,099.17 as retirement benefit to Puan Zurriyani. Dissatisfied, the respondent applied for judicial review to quash the award. The application was allowed wherein the High Court Judge held that the service charge was not part of wages and should not be included in the calculation of the retirement benefits and ordered the matter to be remitted back to the Industrial Court for the calculation of Puan Zurriyani's retirement benefits based on basic salary only. Hence, this appeal on the question of whether the service charge should be included in the calculation of wages in the retirement benefits on Puan Zurriyani.

Held (allowing appeal; setting aside decision of High Court)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) The CA was silent on the definition of 'wages'. In the light of the definition provided in the Employment Act 1955, the word 'wages' in art. 27 of the CA was to include all payments paid to employees for work done in respect of his contract of service which was not only confined to basic salary. The service charge was collected by the respondent and paid to its employees for services rendered. Adopting

A the definition in the Employment Act 1955, the service charge formed part of 'wages' for the purpose of computing the retirement benefits. (paras 15, 20, 27 & 28)

(2) The first appellant's case before the Industrial Court was about non-compliance of art. 27 of the CA and not about art. 12 of the CA. B Article 27 of the CA was on payment of retirement benefits whereas art. 12 of the CA was on the monthly distribution of service charge to the employees of the respondent. Thus, art. 12 of the CA clearly had no relevance to the calculation of retirement benefit. The High Court Judge's decision was unreasonable in the *Wednesbury* sense meaning that C no reasonable tribunal properly applying the law would have possibly come to that decision. The award rendered by the Industrial Court was thus restored. (paras 30-33)

***Bahasa Malaysia** Headnotes*

D Puan Zurriyani, seorang pekerja responden, membuat aduan dengan perayu pertama bahawa responden gagal membayar faedah persaraannya dan bahawa caj perkhidmatan, yang adalah sebahagian gaji, tidak dimasukkan dalam pengiraan faedah persaraan. Dengan itu, perayu pertama melaporkan aduan ketidakpatuhan dengan per. 27 kl. (b)(iii) Perjanjian Kolektif Keempat ('PK') E ke Mahkamah Perusahaan. Mahkamah Perusahaan memberikan award memerintahkan responden mematuhi per. 27 PK dan membayar sejumlah RM40,099.17 sebagai faedah persaraan kepada Puan Zurriyani. Tidak berpuas hati, responden memohon semakan kehakiman untuk membatalkan award tersebut. Permohonan tersebut dibenarkan di mana Hakim Mahkamah Tinggi memutuskan bahawa caj perkhidmatan bukan sebahagian gaji dan F tidak wajar dimasukkan dalam pengiraan faedah persaraan dan memerintahkan perkara tersebut dikembalikan ke Mahkamah Perusahaan untuk pengiraan faedah persaraan Puan Zurriyani berdasarkan hanya gaji pokok. Dengan itu, rayuan ini atas persoalan sama ada caj perkhidmatan perlu dimasukkan dalam pengiraan gaji bagi faedah persaraan Puan G Zurriyani.

Diputuskan (membenarkan rayuan; mengetepikan keputusan Mahkamah Tinggi)
Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

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(1) Tiada apa-apa disebut berkenaan 'gaji' dalam PK. Berasaskan definisi yang diperuntukkan dalam Akta Kerja 1955, perkataan 'gaji' dalam per. 27 PK termasuk kesemua bayaran yang dibuat kepada pekerja-pekerja bagi kerja yang dilakukan berkaitan kontrak perkhidmatannya I yang bukan hanya terikat pada gaji pokok. Caj perkhidmatan dikutip oleh responden dan dibayar kepada pekerjanya bagi perkhidmatan yang diberikan. Mengguna pakai definisi dalam Akta Kerja 1955, caj perkhidmatan membentuk sebahagian 'gaji' bagi tujuan mengira faedah persaraan.

(2) Kes perayu pertama di Mahkamah Perusahaan adalah berkaitan ketidakpatuhan per. 27 PK dan bukan berkaitan per. 12 PK. Perkara 27 PK adalah mengenai bayaran faedah persaraan manakala per. 12 PK adalah mengenai pengagihan bulanan caj perkhidmatan kepada pekerja-pekerja responden. Oleh itu, per. 12 jelas tiada kaitan dengan pengiraan faedah persaraan. Keputusan Hakim Mahkamah Tinggi tidak munasabah dari segi maksud *Wednesbury* bahawa tiada tribunal munasabah mengguna pakai undang-undang dengan sewajarnya boleh mencapai keputusan sedemikian. Oleh itu, award Mahkamah Perusahaan dikembalikan.

Case(s) referred to:

Abdul Aziz Abdul Majid & Ors v. Kuantan Beach Hotel Sdn Bhd & Ors [2012] 1 LNS 1294 CA ***(refd)***

Funk David Paul v. Asia General Asset Bhd [2013] 1 LNS 1327 CA ***(refd)***

Hotel Fortuna Management Services Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia [2000] 2 ILR 163 ***(refd)***

Lee Fatt Seng v. Harper Gilfillan [1980] Sdn Bhd [1988] 1 CLJ 270; [1988] 1 CLJ (Rep) 156 SC ***(refd)***

Mohd Faizal Md Sari & Satu Lagi lwn. Touch Mobileguards Sdn Bhd [2016] 1 CLJ 144 HC ***(refd)***

National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia v. The Plaza Hotel Kuala Lumpur [2015] 1 ILR 443 ***(refd)***

Port View Seafood Village Sdn Bhd v. Rocelyn Tubal Raneses [2011] 4 CLJ 959 HC ***(refd)***

Legislation referred to:

Employment Act 1955, s. 2

For the 1st appellant - Ten Yee Phor & Norsuhaila Mat Nudin; M/s Ten & Colin
For the respondent - Hariharan Tara Singh & Azlan Abdul Razak; M/s CK Oon & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Judicial Review No: 25-76-05-2015 (overruled).]

Reported by S Barathi

JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

[1] This appeal is against the whole of the decision of the learned High Court Judge ("the learned judge") dated 19 May 2016, granting a *certiorari* order to quash Award No. 151 of 2015 which was handed down by the Industrial Court on 15 July 2015. By the said award, the Industrial Court ordered the respondent to comply with art. 27 cl. (b)(iii) of the Fourth Collective Agreement ("the said CA") and pay the sum of RM40,099.17 as retirement benefits to Puan Zurriyani through the first appellant within 14 days of the service of the award. In quashing the award, the learned judge, *inter alia*, held that the service charge is not part of wages and should not be

A included in the calculation of the retirement benefits and ordered that the matter be remitted back to the Industrial Court for the calculation of Puan Zurriyani's retirement benefits based on salary only.

[2] We heard the appeal on 17 January 2017 and after hearing parties' submissions, we allowed the appeal, set aside the decision of the learned B judge and restored the award of the Industrial Court. We now give the detailed reasons for our decision.

Facts Of The Case

[3] The facts of the case, as culled from the learned judge's grounds of C judgment ("GOJ") and the submissions of the parties may be summarised as follows:

(a) The first appellant is a trade union registered under the Trade Unions Act 1959 and Puan Zurriyani is a member of the first appellant. The respondent is a company registered under the Companies Act 1965 and D operates a hotel known as Sheraton Langkawi Beach Resort. Puan Zurriyani had worked with the respondent since 5 May 1993 as a room attendant and retired on 17 February 2013 upon attaining the age of 50.

(b) The first appellant and the respondent had entered into the said CA on 6 February 2010 for a period from 9 January 2009 until 31 August 2012. E It is an important term contained in the said CA that it shall continue to remain in force until 31 August 2012 and thereafter unless superseded by a new collective agreement or award.

(c) The respondent had by a letter dated 18 February 2013 to Puan Zurriyani confirmed her retirement on 27 February 2013 wherein her F retirement benefits had been calculated as follows:

Basic salary of RM1,178/30 days x 403 days = RM15,824.46.

(d) The respondent had failed to pay the retirement benefits to Puan Zurriyani as stated in the said letter dated 18 February 2013. Therefore, G Puan Zurriyani had lodged a complaint of the respondent's failure with the first appellant's house committee who then brought the matter to the national committee of the first appellant.

(e) The first appellant then informed the respondent that until 30 January 2014, no retirement benefits whatsoever was paid by the respondent to H Puan Zurriyani and the service charge, which is part of wages, had not been included in the calculation of retirement benefits as per the said letter dated 18 February 2013.

(f) Consequently, the first appellant lodged a complaint of I "non-compliance" with art. 27 of the said CA to the Industrial Court. The first appellant had requested the Industrial Court to decide on the calculation of the retirement benefits under art. 27 cl. (b)(ii), based on the following formula:

RM1,178.00 x RM1,807.05 x 20 (days) x 20.15 years = RM40,099.17. A

(The sum of RM1,178.00 being the last drawn salary and

RM1,807.05 being the last service charge received).

(g) As alluded to earlier, the Industrial Court had on 10 February 2015 handed an Award No. 51 of 2015, where the Industrial Court had ordered the respondent to comply with art. 27 of the said CA and pay the sum of RM40,099.17 as retirement benefit to Puan Zurriyani. B

(h) Being dissatisfied with the award, the respondent applied for judicial review to quash the award. The learned judge granted the application and held, *inter alia*, that the service charge is not part of wages and should not be included in the calculation of the retirement benefits and ordered the matter to be remitted back to the Industrial Court for the calculation of Puan Zurriyani's retirement benefits based on basic salary only. C

(i) Being dissatisfied with the learned judge's decision, the first appellant and the second appellant appealed to this court. Hence, this appeal before us. D

Issue

[4] The single question which had been argued before us is whether the service charge should be included in the calculation of wages in the retirement benefits on Puan Zurriyani. E

Findings Of The Learned Judge

[5] In granting a *certiorari* order to quash the award handed down by the Industrial Court, the learned judge, *inter alia*, reasoned that the Industrial Court had erroneously made a finding of both fact and law that the retirement benefits should be calculated based on "wages" which included the service charge. According to the learned judge, by virtue of art. 12 of the said CA, the entitlement to the service charge is to be enjoyed by all serving employee of the respondent. The retired employees are not eligible for the service charge. Therefore, any retired employee of the respondent, in pursuit of his retirement benefits, must be prevented from claiming for the service charge to be included within the meaning of "wages" under art. 27 of the said CA. In other words, the learned judge ruled that art. 12 of the said CA does not apply to the calculation of retirement benefits under art. 27 of the said CA. F G H

[6] In support of the decision, Her Ladyship relied on the decision of *National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia v. The Plaza Hotel Kuala Lumpur* [2015] 1 ILR 443 where the Industrial Court held that the service charge should not be included in the calculation of wages in the retirement benefits. I

[7] The learned judge also placed reliance on the decision of the Industrial Court in *Mohd Faizal Md Sari & Satu Lagi lwn. Touch Mobileguards Sdn Bhd* [2016] 1 CLJ 144 where the Industrial Court's decision in *National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia v. The Plaza Hotel Kuala Lumpur (supra)* has been cited and followed. The relevant excerpt is reproduced below:

> Di samping kedudukan di atas, nas autoriti di bawah ini juga jelas menunjukkan adanya perbezaan antara gaji pokok dengan pembayaran kewangan yang lain. Gaji pokok telah dibezakan dengan bayaran kewangan yang lain dalam s. 2 Akta Kerja 1955. Begitu juga dalam *National Union of Employee in Companies Manufacturing Rubber Products v. Ansell Companies Operating in Melaka (Ansell Malaysia Sdn. Bhd/Ansell Medical Sdn Bhd/ Ansell N.P Sdn. Bhd)* [2014] 4 ILR 381, gaji pokok dengan jelas tidak termasuk elaun kewangan seperti mana diputuskan:
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> (3) On the stoppage of the meal allowances for the affected workmen when their basic wages had been increased pursuant to the minimum Wages Order 2012, the term "basic wages" did not include monetary allowances. When the minimum wages of RM900 had been implemented in Peninsular Malaysia on 1 January 2013 pursuant to the said order, the basic wages that had become payable was RM900 per month.
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> Begitu juga selanjutnya dalam N*ational Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia v. The Plaza Hotel Kuala Lumpur* [2015] 1 ILR 443 diputuskan berkenaan dengan caj perkhidmatan dengan gaji pokok begini:
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> Held:
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> (3) There is no definition of the term "wages" or "salary" in the Industrial Relations Act 1967. In decisions of the Industrial Court, both the terms "wages" and "salary" have been used. The term "wages" is defined in the Employees Provident Fund Act 1991, the Employment Act 1955 and the Employees' Social Security Act 1969 but its definition is not uniform. The phrase "clean wage" has now gained currency in the hotel industry and it means that the employees are to be paid a basic wage or basic salary without a service charge.

The Appeal

[8] Learned counsel for the first appellant launched a frontal attack against the decision of the learned judge and vehemently argued that the learned judge had committed an error of law and of fact and Her Ladyship's decision was tainted with *Wednesbury* unreasonableness in holding that the Industrial Court had failed to take into consideration that art. 12(a) of the said CA does not apply to the calculation of retirement benefits under art. 27 of the said CA.

[9] According to learned counsel, the learned judge also had committed an error of law and fact when Her Ladyship failed to appreciate that the first appellant was not claiming the service charge for Puan Zurriyani after her retirement but the inclusion of the service charge payment is part of the "wages" for the purpose of computation of retirement benefits.

[10] Learned counsel contended that the inclusion of the service charge as part of the wages in the calculation of retirement benefits is the same as the inclusion of the service charge in the calculation of the termination or retrenchment benefits under the Employment Act 1955. (See *Lee Fatt Seng v. Harper Gilfillan [1980] Sdn Bhd* [1988] 1 CLJ 270; [1988] 1 CLJ (Rep) 156).

Our Findings

[11] We begin our discussion with reference to the relevant articles of the said CA. Article 12(a) of the said CA states as follows:

> The Hotel shall retain 10% of the 100% service charge imposed on all bills monthly. The remaining 90% service charge shall be fully distributed to all employees covered within the scope of this Agreement as listed in Appendix B, except part-timers, temporary, casual and retired employees.

[12] Article 27 of the said CA on retirement benefits of the said CA is in the following terms:

> Clause (a) On the twenty-five (25th) month of service, the hotel shall contribute each month fifteen percent (15%) of the employee's basic salary for that month to the Employees Provident Fund (EPF). Such contribution shall be deemed to be inclusive of the Hotel's contribution to the EPF as prescribed by the law.
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> Clause (b) In addition to the above benefits the hotel shall pay a retirement benefit to employees who retire from the hotel as follows:

Years of service	**Wages for each year service**
(i) Less than two (2)	10 days
(ii) Two (2) or more but less than five (5)	15 days
(iii) Five (5) or more	20 days. (emphasis added)

[13] The inception and concept of service charge has been succinctly explained by the learned Chairman of the Industrial Court at pp. 7 and 8 of the said award that:

> ... Prior to the introduction of the service charge, as was stated earlier, the hotels practised the "tipping system". Under this system, the customer paid any amount he liked to show his appreciation and generosity and it was not mandatory. Hence, it was gratuitous in nature. Further, only a certain group of employees enjoyed the bounty. As the hotel industry modernised, a more equitable system was introduced which ensured a fair distribution of the customers 'generosity to all employees irrespective of their duties'. Today a fixed service charge (normally 10%) is levied on the

> customers' bills, which must be paid. The money is paid into a fund called the service charge fund. What started off as a trade practice has now been incorporated into collective agreements whereby 10% of the fund is taken by the hotel to defray the administrative costs incurred for the maintenance of the fund and the remaining 90% is distributed to the eligible employees in accordance with the service points allocation under the collective agreement. Hence, the hotels today are contractually bound to make monetary payments to the employees based on their service charge points. The hotel in the instant case imposes a 10% service charge on every bill issued to its customer and Article 12 governs the distribution of the service charge. The money is pooled into a fund to be paid to the employees of the hotel. Article 12 of the Collective Agreement executed by the hotel and union states that the hotel shall retain 10% and 90% shall be fully distributed to all employees covered within the scope of the Collective Agreement as listed in Appendix B ... .

[14] The learned Chairman went on to say:

> The service charge system is unique to the hotel industry. We must note two important features of the system. One is that the money does not come from the employer but collected from the customers of the Hotel and put in a fund. The fund is jointly owned by the hotel and its employees. The second is that pure income for the employee and it is paid to the employee under his contract of service with the hotel.

[15] It is clear, therefore, the customers did not pay the service charge directly to the respondent's employees, but rather the service charge is collected by the respondent and paid to its employee for services rendered and its distribution is governed by art. 12 of the said CA together with the employee's salary every month.

[16] The critical question to be answered is this: whether the word "wages" in art. 27 of the said CA should include all the payment paid to employee for the work done in respect of his contract of service or should it only confine to basic salary.

[17] "Wages" is not defined in the said CA. However, s. 2 of Employment Act 1955 provides that:

> "wages" means basic wages and all other payments in cash payable to an employee for work done in respect of his contract of service but does not include
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> (a) the value of any house accommodation or the supply of any food, fuel, light or water or medical attendance, or of any approved amenity or approved service;
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> (b) any contribution paid by the employer on his own account to any pension fund, provident fund, superannuation scheme, retrenchment, termination, lay-off or retirement scheme, thrift scheme or any other fund or scheme established for the benefit or welfare of the employee;

(c) any travelling allowance or the value of any travelling concession; A

(d) any sum payable to the employee to defray special expenses entailed on him by the nature of his employment;

(e) any gratuity payable on discharge or retirement; or

(f) any annual bonus or any part of any annual bonus; B

[18] The words in s. 2 of the Employment Act 1955 were explained succinctly by the Supreme Court in the case of *Lee Fatt Seng v. Harper Gilfillan (1980) Sdn Bhd (supra)* at p. 159 as follows:

> It seems that the words "work done" in the definition of "wages" are used so as to stress on the requirement that the remuneration must be for work done in respect of the contract of service of the employee concerned, so that any payment made to him by the employer *ex gratia* not for work done or to be done, and not in connection with the contract of service, is not part of the wages. C

[19] The Court of Appeal in the case of *Funk David Paul v. Asia General Asset Bhd* [2013] 1 LNS 1327; [2014] 1 MLJ 681 at p. 689 held as follows: D

> Wages in our view is a term referring to payments for service or works rendered on a regular basis; hence we have the terms or saying 'my weekly or monthly wages' in ordinary parlance. This meaning would explain the exclusion of (a) service charge (b) overtime payment (c) gratuity or (d) retirement benefit from the definition of 'wages' in s 2 wages is but one species of remuneration. E

[20] We are in full agreement with the view expressed by the learned Chairman of the Industrial Court that in the light of the definition as provided for by the Employment Act 1955, the word "wages" in art. 27 of the said CA is to include all payments paid to employees for work done in respect of his contract of service which not only confine to basic salary. Indeed, the Industrial Court's award followed a long line of authority on the issue. F

[21] The learned Chairman had dealt with the definition of wages in the said award at pp. 10 and 11 as follows: G

> The material words in section 2 are "work done in respect of his contract of service". In the Supreme Court case of *Lee Fatt Seng v. Harper Gilfillan* [1988] 1 CLJ 270 at p. 248 Wan Hamzah SCJ stated as follows:
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> > It seems that the words "work done" in the definition of "wages" are used so as to stress on the requirement that the remuneration must be for work done in respect of the contract of service of the employee concerned, so that any payment made to him by the employer *ex gratia* not for work done or to be done, and not in connection with the contract of service, is not part of the wages. H
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> What this case highlights is that payment must be made in connection with the employee's contract of service and it must be for work done, for it to be regarded as part of wages. But where the payment is made as gift or as a favour then it cannot be part of wages. In the present case, the hotel had paid the service charge to aggrieved retiree in connection with I

her contract of employment as a cook by virtue of Article 12 of the Collective Agreement. The hotel was contractually bound to pay in accordance with the service charge points as stated in Appendix B under Article 12 Clause (a). Further, by virtue of section 17(2) of the Industrial Relations Act 1967 the said Article of the Collective Agreement is also an implied term of her contract of employment. *Hence, it is clear from the facts of the case that the hotel paid the service charge to her in return for her services as a cook and not given as a gift. As such, the payment of service charge points to her would be regarded as wages under section 2 of the Employment Act 1955 and further it has not been excluded by its definition*.

(Emphasis added).

[22] With respect, the learned judge seems to us to have fallen into very serious error in deciding that the service charge should not be included in the calculation of wages in the retirement benefits of Puan Zurriyani. The cases relied upon by the learned judge are cases on minimum wages under the National Wages Consultative Council Act 2011 and not under the Employment Act 1955. These cases are rightly decided because the minimum wages does not include the service charge.

[23] There is a plethora of authorities in support of the conclusion reached by the learned Chairman. To name but a few are as follows.

[24] In the Court of Appeal case of *Abdul Aziz Abdul Majid & Ors v. Kuantan Beach Hotel Sdn Bhd & Ors* [2012] 1 LNS 1294, Clement Skinner JCA had this to say:

Service Charge Issue

[35] With regard to the issue of the non-inclusion of service charge in the payment of termination benefits to the appellants, the evidence shows that COW2 and COW3 conceded that service charges were not included in the calculation of the appellant's termination benefits. The learned judge of the High Court first declined to deal with the issue of service charge as she felt that what was before the Industrial Court was a reference under s. 20 of the Industrial Relations Act 1967 and not a reference for non-compliance with a Collective Agreement under s. 56. But the learned High Court Judge went on to say that in fact, the element of service charge was already included in the computation of termination benefits as set out in the schedule to the termination letter.

[36] We find the learned High Court Judge erred in taking the approach she did. **In the first place it is settled law that service charge is part of the wages of an employee**. See *Hotel Equatorial (M) Sdn Bhd v. Thomas George*, High Court Rayuan Sivil R2-16-6-95 which was affirmed by the Court of Appeal; and *Bukit Jambul Hotel Development Sdn Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar dan Restoran, Semenanjung Malaysia* [2005] 2 ILR 927 at p. 943.

[37] In the second place, pursuant to art. 29.1 of the Collective Agreement the hotel was obliged to distribute 90% of all service charge collected to its employees in accordance with Appendix 'B' thereto.

[38] In the third place, art. 39 of the Collective Agreement provides that where an employee's services is terminated for retrenchment by reason of redundancy, the employee shall be entitled to retrenchment benefits **based on the last drawn wages** for every year of service. Accordingly, in our judgment, in a s. 20 reference, the issue of service charge which is part of wages, will have to be dealt with in computing termination benefits or back wages. The schedule to the termination letter shows that the service charge element listed therein is in respect of salary paid and not in respect of termination benefits.

(emphasis added).

[25] In *Port View Seafood Village Sdn Bhd v. Rocelyn Tubal Raneses* [2011] 4 CLJ 959, David Wong Dak Wah J (as His Lordship then was) had carried out an exhaustive recounting of the line of authorities relating to wages and concluded at para. [13] of the GOJ as follows:

[13] Reverting to the issue at hand and applying the established principle of constructing legislation of giving the words their natural meaning and bearing in mind that there was no amendment to the Employment Act after the *Pereira* case, I concur with the interpretation given by the learned Chairman. The pivotal words in my view are 'work done in respect of his contract of service' and as long payments are made because of that service, it is caught by the definition of wages. **In this case there cannot be any denial that the 'service charge' is payment made for work done in respect of his contract of service'. My view is of course fortified by the decision of the Privy Council**.

(emphasis added)

[26] In the case of *Hotel Fortuna Management Services Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia* [2000] 2 ILR 163, the Industrial Court decided that:

It is clear from the above that service charge is not excluded as an element of "wages".

It is further pertinent to note that there is no definition of "wages" in the collective agreement.

Now although the hotel has referred to the definition of "wages" in the EPF Act 1951 and the EPF Guidelines it is abundantly clear that the purpose of that definition is to set down those elements of remuneration for which a contribution has to be made by both parties to the EPF. There is no dispute that service charge does not attract EPF contribution. The hotel's submission is not relevant to the issue at hand.

It is the unanimous finding of the court that as the Employment Act 1955 does not exclude service charge from its definition of "wages" and the collective agreement is silent on this point, service charge therefore forms a part of "wages" for the purpose of computing retirement and retrenchment benefits.

(emphasis added).

[27] The fact in this instant appeal is similar to the facts in *Hotel Fortuna* case (*supra*). The said CA is also silent on the definition of "wages". But the intention of the parties to the said CA is clear in that parties have expressly stated in art. 27 of the said CA on retirement benefits by using the word "wages" and not basic salary.

[28] In our view, the correct approach is to adopt the definition in the Employment Act 1955. Going by the authorities cited above, we entertained no doubt that the service charge forms part of "wages" for the purpose of computing retirement benefits.

[29] This is, however, not the end of the matter. Learned counsel for the respondent submitted that art. 12 of the said CA governs the distribution of service charge collected to all serving employees at the time the service was collected and it is clear that once an employee had retired, he would not be entitled to the service charge even if he or she is re-employed on contract. According to learned counsel for the respondent, art. 12(a) of the said CA is clear and unambiguous on this point.

[30] We have no qualms with the submission. However, we are of the opinion that the learned judge had failed to appreciate that the first appellant's case before the Industrial Court was about noncompliance of art. 17 of the said CA and not about art. 12 of the said CA.

[31] Article 27 of the said CA is on payment of retirement benefits whereas art. 12 of the said CA is on the monthly distribution of service charge to the employees of the respondent. Therefore, art. 12 of the said CA is clearly irrelevant to the issue at hand. To be sure, the issue in this instant appeal is not about an employee's claim for service charge payment after her retirement. Rather, it is a case on how the retirement benefits are calculated under art. 27 of the said CA, more particularly, it is on how the "20 days-wages for each year of service" is calculated. Hence, art. 12 of the said CA has no relevance to calculation of retirement benefit.

Conclusion

[32] We had carefully considered the submissions urged upon us by the parties. We have reached the inescapable conclusion that the learned judge's decision was unreasonable in the *Wednesbury* sense meaning that no reasonable tribunal properly applying the law would have possibly come to that decision.

[33] For all of these reasons, we allowed the appeal, set aside the decision of the learned judge and restored the award rendered by the Industrial Court with costs of RM10,000. So ordered.